IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

THURSDAY, THE 1ST MARCH 2007 / 10TH PHALGUNA 1928

CRL.A.No. 910 of 2002()

CC.294/1999 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, THRISSUR
ORDER DATED 24/10/2002 CRL MC NO. 9723/2002

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APPELLANT: COMPLAINANT

P.T.JOSEPH, S/O.THOMASKUTTY,
AMMADAM, THRISSUR.

BY ADV. SRI.DINESH MATHEW J.MURICKEN

RESPONDENTS: ACCUSED

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1. GOPALAKRISHNAN, CHENNANATH HOUSE,
NEAR KISSAN CORNER, URAKAM, THRISSUR.

2. STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.P.VIJAYA BHANU
SMT.P.MAYA
PUBLIC PROSECUTOR, SRI PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A No. 910 of 2002 (A)

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Dated this the 1st day of March, 2007

J U D G M E N T

The complainant in C.C.No.294/1999 on the file of Judicial Magistrate of the First Class Court, Thrissur, is the appellant. The complaint filed under Section 138 of the Negotiable Instruments Act, in short 'the Act', against the first respondent-accused was dismissed, rejecting the evidence adduced through PW.1, the appellant and also finding that the case put forward by the first respondent, the accused, through DW.1, his aunt, is probable. The same is under challenge through this appeal after obtaining leave.

2. The issuance of Exhibit P1 cheque, signed by the first respondent, is admitted. But the case of the accused, relying on the evidence of DW.1 is that as per Exhibit P8 agreement executed by the accused and his wife, in favour of the appellant, Exhibit P1 cheque was issued as a security. The court below relied on **C.T.Joseph vs. I.V.Philip and others** [2001(1) KLJ 654] and, **Velayudhan vs. Velayudhan** [2001 (1) KLT 392]

and held that mere admission of the signature does not amount to execution of the document.

3. When the appeal came up for consideration, the learned counsel for the appellant relied on **Lillykutty vs.Lawrance** [2003 (3) KLT 721] in which it was held that until the contrary is proved presumption can be made that every negotiable instrument was made for consideration. The Division Bench also further held that filling up of the cheque or putting a date in the cheque, when the drawer has no objection with regard to the name, amount and the signature, it can then be presumed that there is an implied consent, to make such entries, as and when required, by the payee and get the cheque encashed, unless the contrary is proved. In such situation, the burden is entirely on the drawer of the cheque to establish that the payee had no authority to fill up the cheque, to put the date and amount, as could be found from that cheque which is disputed.

4. The counsel for the appellant also relied on **I.C.D.S vs. Beena Shabeer** [2002 (3) KLT 218 (SC)] to show that even if Exhibit P1 cheque was issued as stated in Exhibit P8

agreement by the accused and his wife, in favour of the appellant-complainant, the same will come under 'other liability' stated in Section 138 of the Act and, therefore, the offence under Section 138 of the Act is covered, if no Exhibit P1 cheque had been issued as security.

5. The learned counsel for the first respondent, the accused, had relied on **Narayana Menon vs. State of Kerala** [2006 (3) KLT 404 (SC)] that the accused need only to disprove the existence of consideration, not by direct evidence but through the principle of preponderance of probabilities, inference can be driven from the circumstances on which the accused relies from the evidence adduced by him. I fully agree with the above principles that have been laid down by this Court as well as the Apex Court, discussed above.

6. DW.1 had deposed that there was a transaction between herself and the complainant. But no explanation is forthcoming and the first respondent accused did not enter the box to explain the circumstances under which Exhibit P1 cheque was issued. The arguments of the learned counsel for the first respondent that Exhibit P8 agreement was executed behind his

back, cannot be accepted in the facts of Exhibit P8 and other evidence adduced by the parties. There is no rebuttal evidence adduced, except DW.1. However, the counsel at this stage submits that the first respondent may be given an opportunity to settle the matter with the complainant, particularly, considering the fact that there is a civil suit filed by the appellant relying on the promissory note, the amount of which was inclusive of Exhibit P1 cheque. The amount in the promissory note had been decreed in favour of the appellant. This argument has been denied by the learned counsel for the appellant. But I make no comments on the merit of the matter, for it is to the parties to establish the same. The copy of the civil court decree is not produced before me. Therefore, I am not discussing on that point. At the same time, I agree with the submission that, if civil suit is filed basing on a promissory note or a cheque and if a criminal case is filed on the cheque for the same cause of action, the amount covered by the decree of the civil court, can be adjusted towards the amount that is ordered in the criminal case by a criminal court. But in the present circumstances, there is no evidence before me to show that the subject matter of the

civil suit as well as the subject matter of Exhibit P1 cheque are for the same transaction. However, as the counsel for the first respondent accused is praying for an another opportunity to adduce evidence and disprove the contentions of the appellant, in the circumstances of this case, I am inclined to allow that prayer, despite the fact that this appeal is preferred by the complainant.

7. In the result, the appeal is allowed. The impugned judgment dated 30/07/2002 is set aside. C.C.No.294/1999 is restored to the file of Judicial Magistrate of the First Class Court-I, Thrissur.

8. The parties shall appear before the court below on 09/04/2007.

This case being of the year 1999, the learned Magistrate shall dispose of the same, within two months from the date of appearance of the parties, after giving opportunity to both sides to adduce evidence, as per the law.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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Crl.A No. 910 of 2002 (A)

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J U D G M E N T

1st March, 2007